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FS

No. 16-348

In The
Supreme Court of the United States

MIDLAND FUNDING, LLC,

Petitioner,

v.

ALEIDA JOHNSON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF DBA INTERNATIONAL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER AND FOR REVERSAL OF THE DECISION OF THE COURT BELOW

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CORPORATE DISCLOSURE STATEMENT

Amicus DBA International, Inc., is a non-profit corporation, has no parent entity and no publicly held company owns 10% or more of its stock.

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DBA International, Inc. respectfully submits this *amicus curiae* brief in support of Petitioner for reversal of the decision of the court below.[1]

STATEMENT OF IDENTITY AND INTEREST

DBA International, Inc. ("DBA International") is the nonprofit trade association that represents more than 550 companies that purchase or support the purchase of performing and non-performing receivables on the secondary market. Members of DBA International must conform to its Code of Ethics which requires members to adhere to the highest standard of professional conduct.

In 2013, DBA International introduced the Receivables Management Certification Program (the "Program"). The Program promotes uniform, consumer-oriented, best practice standards for the receivables management industry. The Program accomplishes this through the adoption of national standards for the receivables management industry, including debt buying

[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court, counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief. All parties have consented to the filing of this brief. Those consents have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

companies, third party agencies and collection law firms, to ensure that those who are certified are not only complying with, but exceeding, state and federal statutory requirements, responding to consumer complaints and inquiries, and adhering to industry best practices.

The debt buying companies certified by the Program hold approximately 80 percent of all purchased receivables in the country, by DBA International's estimates.

The Program requires debt buying companies to undergo an independent third-party compliance audit to validate conformity with the Program's standards. This audit includes an onsite inspection of the certified companies to validate full integration of DBA International's standards into the company's operations. Following a company's initial certification, review audits continue to be conducted every two to three years.

Program certification also requires DBA International member companies to engage, at the minimum, a chief compliance officer, with a direct or indirect reporting line to the president, chief executive officer, board of directors, or general counsel of the company. The chief compliance officer must maintain individual certification through the Program by completing 24 credit hours of continuing education every two years.

One standard of the Program concerns debts subject to expired limitations periods. The standard provides:

> Statute of Limitations. A Certified Company shall not knowingly bring or imply that it has the ability to bring a lawsuit on a debt that is beyond the applicable statute of limitations, even if state law revives the limitations period when a payment is received after the expiration of the statute. This standard shall not be interpreted to prevent a Certified Company from continuing to attempt collection beyond the expiration of the statute provided there are no laws and regulations to the contrary.
>
> DBA International, Receivables Management Certification Program, p. 12, Series "A" Standard (12), Version 4.0 (effective August 1, 2016), publicly available at http://tinyurl.com/jdt5kqb.[2]

The Program's standard protects consumers from the possibility that a payment may revive an expired limitations period while at the same time allowing companies certified by the program to continue collection efforts. DBA International has worked with state legislatures and attorneys general in an effort to adopt this standard to all debt collection activity. In the past two years Connecticut (P.A. 16-65, § 53 (May 26, 2016)), Maine (P.L. No. 272 (June 30, 2015)) and Maryland (2016 Md. ALS 579, 2016 Md. Laws 579, 2016 Md. Chap. 579, 2016 Md. SB 771, 2016 Md. ALS 579, 2016 Md. Laws 579, 2016 Md. Chap. 579, 2016 Md. SB 771 (May 19, 2016)) have all enacted legislation largely adopting the Program's standard. DBA International

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[2] Series "A", Standard 12 was first adopted by the Program in 2013 and last revised in August of 2016.

continues to promote this standard and others through its legislative efforts.[3] The Consumer Financial Protection Bureau, which is currently engaged in rulemaking under the FDCPA, has recognized the Program as an "industry best practice."[4]

The Program certification standard permits certified companies to request payment of a debt after the debt's applicable statute of limitations has expired, but prohibits a civil lawsuit, even if state law would revive the limitations period.[5] As we explain below, the standard is consistent with state law permitting continued collection activities.

Petitioner Midland Funding, LLC ("Midland") has been certified by the Program since March of 2016 under certification number C1312-1009(2).

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[3] DBA International's Certification Program was recognized by a resolution of the Michigan State Senate as "exceed[ing] state and federal laws and regulations through a series of stringent requirements that stress responsible consumer protection through increased transparency and operational controls . . . " Michigan SR-33 (March 26, 2015) publicly available at http://tinyurl.com/zpx65kh.

[4] Consumer Financial Protection Bureau, "Small Business Review Panel for Debt Collector and Debt Buyer Rulemaking, Outline Of Proposals Under Consideration and Alternatives Considered," p. 38 (July 28, 2016) publicly available at http://tinyurl.com/hotbmyb.

[5] As Petitioner's brief points out, only two states are known to have statutes of limitations that extinguish the underlying debt, Wisconsin and Mississippi, while the remaining jurisdictions only bar the remedy of a judgment. Petitioner's Brief, pp. 17-18.

Because DBA International's debt buying company members can become subject to the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 et seq. ("FDCPA"), judicial interpretations of the FDCPA substantially impact certified companies like Midland. When those interpretations produce absurd results, the interests of DBA members can be materially, adversely affected.

Such is the case here.

DBA International supports Petitioner's position in this matter. The court below correctly held that the debt owed to Midland by Respondent Aleida Johnson constituted a claim under the Bankruptcy Code because applicable Alabama law permitted Midland to continue to collect the debt following the expiration of the applicable limitations period.

However, the court below was incorrect to hold that Midland violated the FDCPA because the filing of a proof of claim in Respondent's Chapter 13 case is similar to filing a civil lawsuit. The holding is inconsistent with the purposes of the FDCPA and the Bankruptcy Code. As discussed more fully below, debts that may be subject to expired limitations periods are still property rights and can be lawfully collected. The commencement of a Chapter 13 case is a judicial proceeding adverse to those property rights and debt buying companies must be afforded due process, by being permitted to file a proof of claim without the risk of liability and being afforded an opportunity to be heard,

before they are stripped of their property rights. Prohibiting debt buying companies who hold such debts from participating in Chapter 13 cases is counter to the Bankruptcy Code's aim of encouraging creditor participation. It also leads to the absurd result that such debts will not be discharged upon the completion of a Chapter 13 case, a result inconsistent with the Bankruptcy Code's purpose of providing consumers with a "fresh start."

DBA urges this Court to find that the FDCPA does not impose liability on debt buying companies who have a right under state law to request payment and file proofs of claim in bankruptcy cases to protect their property interests.

SUMMARY OF ARGUMENT

Every circuit court that has considered the issues now before the Court, including the court below, has found that a debt potentially barred by a state statute of limitations represents a "claim" under the Bankruptcy Code. Only the Eleventh Circuit, however, holds that a creditor holding such a claim can violate the FDCPA by participating in a Chapter 13 case. The error of the Court Below is that its holding deprives creditors of due process and prevents debtors from receiving the "fresh start" they receive at the end of a successful Chapter 13 case.

A. The FDCPA regulates the conduct of debt collectors, but avoids regulating the debt they collect.

It neither extinguishes nor impairs debt. Thus, the FDCPA does not prohibit collecting a debt subject to an expired statute of limitations. Such debts have value and creditors who hold them have a valid property right.

B. Because creditors can continue to request payment on such debts, the Bankruptcy Code treats these debts as claims. Once a Chapter 13 case is initiated, a creditor is automatically stayed from pursuing payment of its claims. If the Chapter 13 case provides for treatment of a claim, the claim is discharged at the conclusion of a successful Chapter 13 case. Thus, the Chapter 13 process strips creditors of their contract rights.

C. In order to provide necessary due process, creditors must be afforded the opportunity to participate in Chapter 13 cases. The FDCPA cannot be read to make it unlawful for creditors to exercise their due process right to participate in a judicial proceeding which will strip them of their property rights.

D. However, when a creditor does not receive due process in a Chapter 13 case, the Bankruptcy Code will except the creditor's claim from discharge. Thus, even if a debtor schedules a claim in her Chapter 13 case, the claim cannot be discharged when the creditor is prohibited from participating in the bankruptcy process. Thus, the Bankruptcy Code is designed to encourage creditor participation so that all claims, no matter how remote, are ultimately discharged. Creditor participation also benefits consumers who inadvertently

forget to schedule debts in their Chapter 13 cases because unscheduled claims are not discharged in Chapter 13 cases. If the FDCPA is violated when creditors participate in cases where they possess a valid claim, as the Court Below held, creditors will certainly not participate in the Chapter 13 process. The result is claims will not be discharged that would otherwise be discharged if the Bankruptcy Code were permitted to operate as intended.

E. The Chapter 13 claims process contemplates creditors filing claims for debts subject to expired statutes of limitations. These claims are routinely "disallowed," meaning they are not paid. But when a claim is disallowed it also means it can be discharged at the conclusion of the Chapter 13 case. The Chapter 13 claims process works because it provides creditors due process and allows debtors, trustees and creditors to object to claims for a variety of reasons. Honest creditors participate in the process even when their claims are subject to disallowance because it brings finality to both the creditor and its debtor.

F. Thus, the Chapter 13 claims process bears little resemblance to a collection lawsuit. The Chapter 13 case is *adverse* to creditor's rights and seeks to extinguish those rights on terms determined by the debtor and the Bankruptcy Code. The debtor voluntarily initiates the Chapter 13 case and the end result is to free the debtor from her obligation to the creditor. Collection lawsuits are adverse to debtors, seek judgment based on the debt contract and, if they result in a judgment, can cause involuntary executions over

which the debtor has little control. The purpose of the claims process is not to enforce debts, but to provide treatment of claims, even those that can be disallowed, so that due process is satisfied and debtors can achieve a fresh start.

ARGUMENT

All but one of the circuit courts to have considered the issue of whether filing a bankruptcy proof of claim asserting potentially time-barred debt violates the FDCPA have held that it does not. See *Owens v. LVNV Funding, LLC*, 832 F.3d 726 (7th Cir. 2016); *Dubois v. Atlas Acquisitions LLC*, 834 F.3d 522 (4th Cir. 2016); *Nelson v. Midland Credit Mgmt., Inc.*, 828 F.3d 749 (8th Cir. 2016). Only the Eleventh Circuit has reached a different result. See *Johnson v. Midland Funding, LLC*, 823 F.3d 1334 (11th Cir. 2016); *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254 (11th Cir. 2014).

In the case now before the Court, the Eleventh Circuit agreed with the other circuit courts that a debt subject to an expired limitations period is a "claim" within the meaning of 11 U.S.C. § 101(5) of the Bankruptcy Code. *Johnson v. Midland Funding, LLC*, 823 F.3d at 1338-39. ("So although a party may not be able to enforce its claim because of a statute-of-limitations bar, that party still may assert the claim in the first place."). In doing so, the *Johnson* court added that the holder of a claim possesses a "right to payment," and the expiration of the state statute of

limitations (under Alabama law here) only potentially bars a judgment, but not the right to collect the claim through other means. *Id.*, at 1338. See also *Dubois*, 834 F.3d at 529; *Owens*, 832 F.3d at 731. Thus, although the claim may ultimately be disallowed in the Chapter 13 claims process, a creditor holding such a claim can participate in a debtor's Chapter 13 case. *Johnson*, 823 F.3d at 1338-39.

However, its decision to make it *unlawful* under the FDCPA for a creditor holding a *lawful* claim to participate in the Chapter 13 claims process (as intended by the Bankruptcy Code) creates an untenable result: a creditor's exercise of its due process rights also causes it to violate the FDCPA. The Eleventh Circuit's decisions on this issue have created a procedural framework through which creditors holding potentially time-barred claims must either allow the bankruptcy court to deprive them of property interests without objection, or risk civil liability for exercising their constitutional right to be heard.

DBA International urges the Court to reject the Eleventh Circuit's position and adopt the decisions of the vast majority of other circuits that have considered this issue and correctly applied the law.

A. Because Debts Subject to Expired Limitations Periods are Permissible to Collect Under the FDCPA, They Are Property Rights

Under Alabama law applicable here, even if the statute of limitations applicable to the debt at issue expired, it would not serve to extinguish the debt. *Johnson*, 823 F.3d at 1338-39. Therefore, in order to afford debtors relief from payment of such debts, the Bankruptcy Code contemplates the filing of claims subject to expired limitations periods. *Id.*, at 1338; *Dubois*, 834 F.3d at 530.

Debt buying companies may sometimes be subject to the FDCPA. See *Davidson v. Capital One Bank (USA), N.A.*, 797 F.3d 1309, 1316 (11th Cir. 2015); *Pollice v. Nat'l Tax Funding, L.P.*, 225 F.3d 379, 403 (3d Cir. 2000). However, the FDCPA does not alter state law treatment of their debt and does not extinguish it. *Shimek v. Forbes*, 374 F.3d 1011, 1013 (11th Cir. 2004) (*per curiam*) citing *Bartlett v. Heibl*, 128 F.3d 497, 501 (7th Cir. 1997). See also *Vitullo v. Mancini*, 684 F. Supp. 2d 760, 765 (E.D. Va. 2010) (finding the FDCPA contained no provision to cancel or extinguish a debt). Thus, the FDCPA does not regulate debts, only the conduct undertaken by debt collectors in collecting debts. *Simon v. FIA Card Services, N.A.*, 732 F.3d 259, 274 (3d Cir. 2013).

Since debts are not impaired, the FDCPA does not prohibit debt collectors from continuing their efforts to collect debt subject to an expired state statute of limitations. *Huertas v. Galaxy Asset Mgmt.*, 641 F.3d

28, 32-33 (3d Cir. 2011); *McMahon v. LVNV Funding, LLC*, 744 F.3d 1010, 1020 (7th Cir. 2014).

Because debts, like that at issue here, continue to be lawfully collected after the expiration of any applicable limitations period, they continue to possess monetary value to creditors, even to creditors subject to the FDCPA. *Glenn v. Cavalry Invs. LLC (In re Glenn)*, 542 B.R. 833, 847 (Bankr. N.D. Ill. 2016).

B. The Claims Process "Encourages" Creditors to Participate Because It Materially Impairs if Not Destroys Their Contract Rights in Their Debts

Once a debtor initiates her bankruptcy action under Chapter 13, the Bankruptcy Code prohibits any collection efforts by her creditors by operation of the automatic stay. See 11 U.S.C. § 362(a). The Bankruptcy Code's automatic stay "is one of the fundamental debtor protections supplied by the bankruptcy code." *In re University Medical Center*, 973 F.2d 1065, 1074 (3d Cir. 1992), citing *In re Atlantic Business & Community Corp.*, 901 F.2d 325, 327 (3d Cir. 1990).

In this case, once Respondent filed her Chapter 13 petition, the automatic stay immediately prohibited any effort by Petitioner to exercise its state law right to collect the debt. Notably, § 362(a) is broad and is applicable to "all entities," and Petitioner's collection activities would have been stayed even if Respondent had omitted Petitioner's debt from her bankruptcy filings. See *In re Mann*, 22 B.R. 306, 309 (Bankr. E.D.

Pa. 1982) (finding that creditor violated § 362(a) even though it had no notice of the debtor's bankruptcy filing.).

Upon invoking Chapter 13 protections, a creditor's claims are relegated to the bankruptcy claims process under 11 U.S.C. § 501, regardless of whether those claims are cognizable in a state court lawsuit. See *Dubois*, 834 F.3d at 530; *Owens*, 832 F.3d at 731; *In re Clark*, 91 B.R. 324, 338 (Bankr. E.D. Pa. 1988) (citing and collecting cases).

In addition to the stay, at the conclusion of a Chapter 13 case, the debtor receives a discharge of all debts provided for in the plan. 11 U.S.C. § 1328(a). The discharge at the plan's conclusion bars any further collection efforts, whether via lawsuit or otherwise. *Id.*

Using the hammer of § 362(a) and the anvil of the discharge injunction, the Bankruptcy Code "encourages participation of all interested parties on issues relevant to the debtor." *Norris Square Civic Ass'n v. Saint Mary Hosp.*, 86 B.R. 393, 399 (Bankr. E.D. Pa. 1988) (citations omitted); *Dubois*, 834 F.3d at 531 (quoting 1 Norton Bankr. L. & Prac. § 3:9 (3d ed. 2016)); *Owens*, 832 F.3d at 732. See also *Zotow v. Johnson (In re Zotow)*, 432 B.R. 252, 261 (B.A.P. 9th Cir. 2010) (noting that because § 362 causes collection efforts to cease, it acts to "control creditor action by encouraging creditors to participate in the bankruptcy process to resolve their claims").

This "encouragement" is anything but subtle. A willful violation of the stay is punishable by sanctions. See 11 U.S.C. § 362(k).

But the Bankruptcy Code is also mindful that the automatic stay and discharge are adverse to creditor's state law rights and alleviates the detrimental impact by allowing creditors to participate in the bankruptcy claims process. *United States by & Through IRS v. Hairopoulos (In re Hairopoulos)*, 118 F.3d 1240, 1244 (8th Cir. 1997). See also *In re Martinez*, 51 B.R. 944, 947 (Bankr. D. Colo. 1985) (noting that Chapter 13 proceedings are subject to the Due Process Clause and that creditors should have the "opportunity to protect their interests.").

C. Because Chapter 13 Cases Materially Impair Creditors' Rights, They Must Be Permitted to Participate in the Claims Process

The Fifth Amendment of the United States Constitution provides that "[n]o person shall be . . . deprived of . . . property[] without due process of law." U.S. Const., amend. V. "Procedural due process imposes constraints on governmental decisions which deprive individuals of . . . property interests within the meaning of the Due Process Clause of the [Fifth Amendment]." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (internal quotations omitted). "This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest." *Id.* at 333.

1. Chapter 13 Cases Implicate the Property Rights of Holders of Claims

In the bankruptcy context, this Court has held "that a reasonable opportunity to be heard must precede judicial denial of a party's claimed rights." *New York v. New York, New Haven & Hartford Railroad Co.*, 344 U.S. 293, 297 (1953).

Because a Chapter 13 case will deprive creditors of their property rights, creditor participation in bankruptcy proceedings is uniformly recognized. *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 272, 130 S. Ct. 1367, 1378 (2010) (Creditor's due process rights not violated where it had actual notice of Chapter 13 plan in time to object to treatment of its claim). The Third Circuit has recognized due process as "a concept rooted in fairness and applicable to bankruptcy through the Fifth Amendment." *Wright v. Owens Corning*, 679 F.3d 101, 107 n.6 (3d Cir. 2012). According to the Third Circuit, "[d]ue process requires 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Id.* at 108 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)). At a minimum, due process should require that creditors be allowed to file proofs of claim to assert their rights to payment. Cf. *Republic Nat'l Bank v. Crippen*, 224 F.2d 565, 565-66 (7th Cir. 1955) (denying creditors in Chapter 11 bankruptcy hearing to present evidence on their proofs of claim constituted "denial of due process which is never harmless error"). Circuit

courts are uniform in their understanding that creditors cannot be divested of their property rights absent adequate notice and the *opportunity* to participate in the bankruptcy proceeding. See, e.g., *Vicenty v. San Miguel Sandoval (San Miguel Sandoval)*, 327 B.R. 493, 506 (B.A.P. 1st Cir. 2005) (Chapter 13 creditors entitled to due process "[n]otwithstanding strict application of the limits and duties imposed on creditors by the Bankruptcy Code. . . ."); *GAC Enters. v. Medaglia (In re Medaglia)*, 52 F.3d 451, 455 (2d Cir. 1995) (reasonable notice of Chapter 7 proceeding satisfied due process because the creditor was afforded an opportunity to be heard prior to deadline for objections to discharge); *Piedmont Tr. Bank v. Linkous (In re Linkous)*, 990 F.2d 160, 163 (4th Cir. 1993) (Creditor denied due process where notice of Chapter 13 plan did not reasonably apprise creditor of proposal to "cram down" value of secured claim); *Sequa Corp. v. Christopher (In re Christopher)*, 28 F.3d 512, 517 (5th Cir. 1994) (Due process provided when creditor had "actual notice" of debtor's Chapter 11 filing in time to file objection); *Lampe v. Kash*, 735 F.3d 942, 943 (6th Cir. 2013) ("A debt is the creditor's property, and the Due Process Clause entitles her to service of notice 'reasonably calculated' to reach her before she is deprived of that property."); *United States by & Through IRS v. Hairopoulos (In re Hairopoulos)*, 118 F.3d at 1244 ("The constitutional component of notice is based upon a recognition that creditors have a right to adequate notice and the opportunity to participate in a meaningful way in the course of bankruptcy proceedings.").

Here, Petitioner – like any other creditor holding a potentially time-barred claim – had a property right that the bankruptcy court could not deprive without affording it the opportunity to be heard. *Glenn*, 542 B.R. at 848 (observing that "to deny such creditor a voice on the issue most directly bearing on the creditor, its claim, is more than problematic"); see, e.g., *New York*, 344 U.S. at 297. As Petitioner's Brief explained in more detail, the running of the statute of limitations under Alabama law – like the law of most states – did not extinguish Petitioner's right to payment notwithstanding the debtor's available affirmative defense in a collections action. Petitioner's Brief, pp. 17-18. Accordingly, the Bankruptcy Code allowed Petitioner to file its proof of claim, which is the procedural mechanism by which Petitioner could exercise its constitutional right to be heard. See 11 U.S.C. § 502.

If the FDCPA is expanded to impose civil liability on debt collectors for exercising their opportunity to be heard in the bankruptcy court, then those debt collectors are either being deprived of property rights without due process or their claims – i.e. their rights to continue seeking payment on the potentially time-barred debt – cannot be subject to the bankruptcy automatic stay or discharge. Neither of these scenarios is consistent with the purposes of the FDCPA or the Bankruptcy Code.

2. Applying the FDCPA to Impose Civil Liability on Debt Collectors for Participating in Bankruptcy Proceedings Unfairly Infringes on Their Due Process Rights and Is Contrary to the Bankruptcy Code

The Eleventh Circuit's opinion below underscores the systemic dissonance created by its own analysis. According to the Circuit Court's opinion: "[W]hile we recognize that creditors can file proofs of claim they know to be barred by the relevant statute of limitations, those creditors are not free from all consequences of filing these claims." *Johnson*, 823 F.3d at 1339. In other words, according to the court below, creditors may exercise their constitutional due process rights to be heard before the bankruptcy court, but a certain subset of those creditors – namely, those that could be subject to the FDCPA – must risk civil liability to do so. *Id.* This formulation simply does not conform to the standard notions of fundamental fairness underlying Fifth Amendment due process protections. See *Wright*, 679 F.3d at 107 n.6.

This is exactly the result of the Eleventh Circuit's reasoning in this matter and in *Crawford*. The Circuit Court's opinion below expressly recognized that "although a party may not be able to enforce its claim because of a statute-of-limitations bar, that party still may assert the claim in the first place." *Johnson*, 823 F.3d at 1338-39. Nevertheless, the Circuit Court maintained that creditors who properly file such a valid claim are subject to civil liability under the FDCPA. *Id.*, at 1339 (citing 15 U.S.C. § 1692k).

Here, Petitioner – like any other creditor – had a property right by virtue of its claim. The Bankruptcy Code details procedures to ensure Petitioner had the opportunity to be heard before its property right was extinguished. See, e.g., 11 U.S.C. § 502. The Bankruptcy Code's claims process is designed to provide creditors due process before they are stripped of their property rights. Imposing civil liability on Midland – or any other creditor – for participating in a proceeding initiated by the Respondent and designed to deprive Midland of its property right is fundamentally unjust.

The FDCPA does not extinguish a creditor's property right to payment of a time-barred debt and the Bankruptcy Code cannot be contorted to do so without providing creditors the opportunity to participate. *Glenn*, 542 B.R. at 847 ("[The] industry has just as clearly relied upon the nature of the time-barred debt discussed above (e.g., the continuing nature of the debt and the ability to accept payment on it). . . . There is no question, therefore, that Cavalry's property rights are protected by the Fifth Amendment.")

Similarly, the Circuit Court's recognition that the FDCPA provides a safe harbor for debt collectors who act in good faith is entirely irrelevant in the context of the deprivation of an existing property right. The very existence of the claim recognizes the existence of a property right and Midland must be afforded due process before its right is extinguished. Even the Eleventh Circuit recognizes that the Bankruptcy Code allows creditors to file proofs of claim on potentially time-barred debts. See *Johnson*, 823 F.3d at 1338-39. Every

proof of claim filed on a potentially time-barred debt, which is accurate and in conformance with the Bankruptcy Code and Rules – whether filed by a debt collector or any other creditor – is necessarily filed in good faith. The Bankruptcy Code specifically contemplates such claims and encourages the filing of proofs of claim upon them to satisfy fundamental due process before a creditor can be stripped of its property right. The FDCPA does not diminish the due process protections provided to creditors by the Bankruptcy Code or any other law and cannot be interpreted as allowing such an absurd result.

D. Imposing FDCPA Liability for Filing Potentially Time-Barred Proofs of Claim Is at Odds With the Claims Process and Implicates Larger Systemic Concerns Which Ultimately Interfere With the Bankruptcy Code's "Fresh Start" Policy

The dilemma created by *Johnson* for Midland and similar creditors can be framed by considering the effect of prohibiting such creditors to participate in the bankruptcy claims process. The Third Circuit has addressed this larger system concern, finding that when a creditor is denied participation in a bankruptcy case, the creditor's claim cannot be discharged. *Wright*, 679 F.3d at 107 n.6, citing *Jones v. Chemetron Corp.*, 212 F.3d 199, 209 (3d Cir. 2000).

The court below failed to consider the larger systemic impact of its decision and the consequences of

making it unlawful for creditors to participate in Chapter 13 cases. If the FDCPA is applied to make it unlawful to file proofs of claim for debts that are simply subject to a state law defense but are otherwise collectable under state law, then the very purpose for which consumers seek protection under Chapter 13 is imperiled.

1. Prohibiting Creditor Participation Results in Valid Claims Not Being Discharged

A debt owed to a creditor who is denied the opportunity to participate is not discharged.[6] *Owens*, 832 F.3d at 732; *Jones v. Chemetron Corp.*, 212 F.3d at 209. The purpose of the Bankruptcy Code, to provide debtors with a fresh start, " . . . a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt," is defeated. *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934). Yet that is the result of the Eleventh Circuit's ruling below and in *Crawford* and the perilous situation the two decisions have created for consumers and creditors. There is simply no just way to prohibit creditors who hold claims from participating in a debtor's Chapter 13 bankruptcy without saving the claims from discharge.

The conduct here is not offensive to the FDCPA. It does not prohibit collection of time-barred debts and

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[6] The only exception is in "no-asset" Chapter 7 cases. See generally *Judd v. Wolfe*, 78 F.3d 110, 115 (3d Cir. 1996).

does not extinguish them. The Code encourages creditors to participate and file their claims so it can discharge the debts owed them and provide the "honest but unfortunate debtor" relief from the very claims that caused them to seek Chapter 13 protection in the first place. *Local Loan Co.*, 292 U.S. at 244.

Finding that the filing of proofs of claim on such debts violates the FDCPA will deprive creditors from participation in the claims process. The result is that these claims cannot and will not be discharged. It is an absurd result contrary to the purpose of the Bankruptcy Code and the debtor's desire to be free from debt collection activity. See *Jerman v. Carlisle*, 559 U.S. 573, 600 (2010) (recognizing that the FDCPA "should not be assumed to compel absurd results").

2. Barring Creditor Participation Harms Debtors Because Unlisted Claims Are Not Discharged Under Chapter 13

The lasting effect of *Crawford* and *Johnson* is to discourage creditor participation in the Eleventh Circuit, but the result does not benefit Chapter 13 debtors especially when the debtor fails to list the claim in her bankruptcy petition.

In a Chapter 13 case, a claim which is not scheduled or listed by the debtor and for which no proof of claim is filed, is not discharged. See 11 U.S.C. § 1328(a); see also *Dilg v. Greenburgh*, 151 B.R. 709, 716 (Bankr. E.D. Pa. 1993) ("The reasoning employed by the foregoing cases make it clear that an omitted creditor,

who receives no notice of any significant events in a Chapter 13 case, will not have the debt owed to that creditor discharged.").

This harsh result occurred in *In re Kristiniak*, 208 B.R. 132 (Bankr. E.D. Pa. 1997). There, debtors in a Chapter 13 case made the "honest mistake" of omitting an unsecured creditor, Household Finance Consumer Discount Co. ("HFC") from their Chapter 13 filings. The debtors' Chapter 13 plan was confirmed on February 17, 1994. Three years later, Reed Investors Corporation ("Reed"), as successor to HFC moved for relief from the automatic stay to collect the omitted debt, a revolving loan HFC had made to the debtors in 1985. The husband-debtor admitted that it appeared he and his co-debtor wife executed the loan agreement, but they had no recollection of the loan or the purpose for which it was obtained. *Id.*, at 133.

Because the burden of demonstrating a creditor's knowledge is on the debtors and the bankruptcy court found no basis to believe Reed knew of their case, the debtors proposed to remedy their honest omission by amending their plan to include Reed. *Id.* This solution was not available because under the applicable circuit law, the bar date to file a claim in a Chapter 13 case cannot be extended by the court. *Id.* at 134, citing *In re Vertientes, Ltd.*, 845 F.2d 57 (3d Cir. 1988). Rather, as an omitted creditor that did not receive notice of the case, Reed's debt was not discharged. *In re Kristiniak*, 208 B.R. at 135. The court reached this conclusion even though it had concerns that the debt owed to Reed was time-barred. *Id.*

In re Kristiniak is no outlier, and numerous courts cite it as authority for holding that omitted creditors in Chapter 13 may proceed to collect their unscheduled debts because they have not been discharged. *In re Nwonwu*, 362 B.R. 705, 710 (Bankr. E.D. Va. 2007) ("Although such creditors are not entitled to share in the distribution from the estate, they may enforce their claims after the conclusion of the case or, if they obtain relief from the automatic stay, even while the case is pending."); *In re Windom*, 284 B.R. 644, 647 (Bankr. E.D. Tenn. 2002) (same); *In re Morris & Johnnie Fugate*, 286 B.R. 778 (Bankr. N.D. Cal. 2002) (denying debtors' motion to file a late claim).

Creditors can and do file proofs of claim even when their claims are not listed or scheduled by Chapter 13 debtors. Such was the case in *Dubois*. *Dubois*, 834 F.3d at 525 ("Dubois did not list the debt on her bankruptcy schedules nor did she send a notice of bankruptcy to Atlas."). Thus, the creditor's filing of a proof of claim in *Dubois* only furthered the purpose of the Bankruptcy Code because it afforded the debtor a discharge of a debt she inadvertently omitted. *Id.*, at 531. ("Clearly, then, when a time-barred debt is not scheduled the optimal scenario is for a claim to be filed and for the Bankruptcy Code to operate as written."). Not scheduling a debt still subjects the creditor to the automatic stay of § 362(a), so an honest creditor (and one who would rather not wait for a Chapter 13 plan to complete itself in three to five years) would want to participate. Perhaps the claim will be allowed and partially paid – perhaps it will be disallowed, but at least there

will be finality for all concerned through discharge at the completion of a successful Chapter 13 plan.

Allowing debt collectors to file proofs of claim for potentially time-barred debts also furthers the purposes of the FDCPA. The FDCPA's stated purpose is "to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. § 1692(e).

In the bankruptcy context, this purpose is well served by the automatic stay imposed on creditors upon the filing of a bankruptcy petition. See 11 U.S.C. § 362(a). However, if creditors are deprived of their right to be heard in the bankruptcy process, the bankruptcy court's jurisdiction is called into question, along with the court's ability to enforce the Code's automatic stay. See *In re Smith Corset Shops*, 696 F.2d 971, 976-77 (7th Cir. 1982) (automatic stay not violated where debtor enticed creditor into violation to enable debtor to successfully sue creditor for conversion, because "equitable and due process considerations apply in the exercise of bankruptcy jurisdiction"), discussing *Bank of Marin v. England*, 385 U.S. 99 (1966) (superseded by amendment to Bankruptcy Code).

Moreover, this Court has also recognized the FDCPA's "apparent objective of preserving creditors' judicial remedies." *Heintz v. Jenkins*, 514 U.S. 291, 296 (1995). The objective to preserve creditors' judicial

remedies, the Act's consumer protection purpose, and the Bankruptcy Code's "fresh start" goals are all best served by allowing creditors to file proofs of claim -- even when the debts represented by those proofs of claim are potentially subject to a state law statute of limitations defense.

E. Creditor Participation Benefits Debtors and Creditors – the Claims Process Is Not "Broken." Claims Subject to Disallowance Are Still Claims

The existence of a claim does not necessarily entitle a creditor to payment on that claim. Pursuant to 11 U.S.C. § 501(a), a creditor may file a proof of claim. The Federal Rules of Bankruptcy Procedure governing the filing of proofs of claim provides that filing a proof of claim consistent with the Rule constitutes prima facie evidence of the validity and amount of the claim. See Fed. R. Bankr. P. 3001. Thereafter, claims are either allowed or disallowed pursuant to 11 U.S.C. § 502. A debtor can object to the claim on the basis that the claim is subject to a state law defense, like an expired limitations period. See 11 U.S.C. § 502(b)(1) (a claim may be disallowed if it is unenforceable against the debtor under any agreement or applicable law).

The claims objection process is nothing new to the Bankruptcy Code and has long been a part of bankruptcy jurisprudence. See, e.g., *Keeler v. PRA Receivables Mgmt., LLC (In re Keeler)*, 440 B.R. 354, 361-63 (Bankr. E.D. Pa. 2009) (discussing the claims process

under both the Bankruptcy Act of 1898 and the present Bankruptcy Code). The United States Bankruptcy Court for the Eastern District of Pennsylvania recently noted that "[w]ith some frequency, claims are disallowed upon objection because they are unenforceable under applicable nonbankruptcy law due to the expiration of the statute of limitations." *In re Umstead*, 490 B.R. 186, 195 n.12 (Bankr. E.D. Pa. 2013). Because such claims are disallowed "with some frequency," the claims process is functioning as Congress intended.

If a claim is subject to disallowance because of a state law defense (even one that is "iron-clad"), it does not mean that the creditor should not or cannot file the claim. Section 502(b)(1) contemplates such filings and provides for the disallowance of claims that are "unenforceable against the debtor or property of the debtor . . . under applicable law." 11 U.S.C. § 502(b)(1). See also *Dubois*, 834 F.3d at 530; *Owens*, 832 F.3d at 732. Claims that are subject to the defense of an expired limitations period fall squarely into § 502(b)(1). *In re Freeman*, 540 B.R. 129, 136 (Bankr. E.D. Pa. 2015). See also *In re Edge*, 60 B.R. 690, 699 (Bankr. M.D. Tenn. 1986) ("That a claim is not allowable because a statute of limitation has expired does not defeat the existence of the claim in bankruptcy.").

A larger systemic concern comes to a head here. The "fresh start" goal of Chapter 13 is defeated if creditors are prohibited from filing proofs of claim. If a debtor fails to schedule a forgotten, potentially time-barred debt but completes her Chapter 13 plan, the potentially time-barred debt will not be

discharged. A Chapter 13 discharge order only discharges "all debts provided for by the plan or disallowed. . . ." 11 U.S.C. § 1328(a) (emphasis added). This interpretation comports with the Code's desire that the holders of all claims have the opportunity to participate and satisfy the due process necessary to cause their rights against the debtor to be discharged.

Whether a claim will be "allowed," or is free from objection is expressly not what determines the existence of a claim for the purposes of claim filing and discharge. "[G]iven Congress' intent that 'claim' be construed broadly, we do not believe that Congress intended the bankruptcy courts to use the Code's definition of 'claim' to police the Chapter 13 process for abuse." *Johnson v. Home State Bank*, 501 U.S. 78, 88, 111 S. Ct. 2150, 2156 (1991). Rather, the Bankruptcy Code's intention is to encompass, as broadly as possible, whatever constitutes a right to payment, provide for its treatment in the claims process, stay collection of it under § 362 and ultimately discharge it under § 1328. Whether the claim will be allowed is of no consequence to the Chapter 13 claims process – it is the existence of the claim and its inclusion in the case which is the overriding concern.

F. The Claims Process Bears No Resemblance to a State Court Collection Lawsuit

Notably, unlike a creditor-initiated state court lawsuit, the bankruptcy claims process is triggered by

the debtor's filing of her bankruptcy petition. The commencement of a bankruptcy case automatically invokes protections for debtors that are adverse to creditor's state-law rights. See, e.g., 11 U.S.C. § 362(a). By participating in a Chapter 13 case, a creditor submits itself to the bankruptcy process that may allow or disallow its claim and ultimately lead to the discharge of the obligation owed to it. *Billing v. Ravin, Greenberg & Zackin, P.A.*, 22 F.3d 1242, 1249 (3d Cir. 1994). At the conclusion of a successful Chapter 13 plan, a creditor does not leave with a judgment allowing it to enforce its debt through involuntary executions against the debtor. Instead it leaves with an order permanently enjoining it from any effort to collect the debt it submitted under its proof of claim.

In the context of the constitutional due process concerns implicated by imposing FDCPA liability for filing a potentially time-barred proof of claim, the debtor in a bankruptcy proceeding is obtaining relief against the creditor, not the other way around. If a debt collector filed a state court collection action, the debt collector could not obtain a judgment against the debtor without the debtor receiving notice and an opportunity to be heard. See, e.g., *Mullane*, 339 U.S. at 313 (minimal requirement for depriving property by adjudication includes "opportunity for hearing appropriate to the nature of the case"). In fact, this due process right is what ensures debtors can appear and assert applicable state law defenses such as the statute of limitations.

Likewise, if a debtor initiates a bankruptcy proceeding, the impacted creditors – including impacted debt collectors – must be allowed to appear and assert their rights to payment. The same due process rights that protect debtors also protect debt collectors. See *Covington & Lexington Turnpike Road Co. v. Sanford*, 164 U.S. 578, 592 (1896) ("It is now settled that corporations are persons within the meaning of the constitutional provisions forbidding the deprivation of property without due process of law, as well as the denial of the equal protection of the laws."). Applying the FDCPA to punish debt collectors for participation in bankruptcy proceedings designed to deprive their property rights violates due process.

CONCLUSION

For these reasons, DBA respectfully requests that the Court reverse the Circuit Court's decision below finding the FDCPA is violated when a debt collector files a proof of claim representing a debt subject to an expired state statute of limitations.

Respectfully submitted,

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